Petition

81-670

No._____

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

PETER MARK JONES,

Petitioner,

v.

MICHAEL TAIBBI

and

BOSTON BROADCASTERS, INC.,
d/b/a Channel 5,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Does an admitted agreement between a television reporter and a municipal police department which allows the reporter and a television station to obtain, and later broadcast, exclusive film footage of a warrantless and unreasonable arrest of the Petitioner by that police department constitute joint activity subjecting the reporter and station to liability under 42 U.S.C. §1983?

2. Was the Respondent's Summary Judgement Motion improperly granted when the courts below ignored uncontested facts and reasonable inferences which would permit the jury to conclude that by exploiting the afore-mentioned agreement, and filming and broadcasting the Petitioner's unreasonable and erroneous arrest, the Respondents acted in violation of the Petitioner's constitutional, statutory and common law rights?

PARTIES

The caption of the Case in this Court contains the names of all parties relevant to this Petition for Writ of Certiorari.[1/]

1/ This case involves a grant of partial summary judgement. The claims against two other parties, the American Broadcasting Company, Inc. d/b/a ABC and William Bergin and the state law claims against the respondents are still pending in the lower courts. See Prior Proceedings, infra, at pp. 7-9.

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OFFICIAL AND UNOFFICIAL REPORTS BELOW

The opinion of the United States District Court for the District of Massachusetts is reported at 508 F. Supp. 1069, and is reproduced in the Appendix, infra, pp.6-28.

The opinion of the United States Court of Appeals for the First Circuit is not reported, and is reproduced in the Appendix, infra, p.29. The order of the same Court denying rehearing is not reported and is reproduced in the Appendix, infra, p. 30.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 17, 1981.

A Petition for Rehearing by the United States Court of Appeals for the First Circuit was denied on July 8, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTES AND RULES

United States Code Title 42 Section 1983:

Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the Party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> R.S. §1979.

Federal Rules of Civil Procedure, Rule 56 (reproduced infra, Appendix pp. 1-5)

STATEMENT OF THE CASE

I. Prior Proceedings

On March 23, 1979, Peter Mark Jones, Petitioner, filed suit in the Superior Court of Massachusetts against Michael Taibbi and the Boston Broadcasters, Inc. (Channel 5),

the Respondents, and several others.[2/] The claims against Taibbi and Channel 5 included both state law claims, specifically, defamation, invasion of privacy under Massachusetts law and invasion of privacy under California law, and claims arising under 42 U.S.C. §1983, based on a warrantless, unreasonable arrest of the Petitioner Jones by Los Angeles Police. The Respondents and the other defendants obtained removal to Federal District Court pursuant to 28 U.S.C. §1441 (a), cf. 28 U.S.C. §1331 (a).

On March 3, 1980, a general Motion for Summary Judgment on behalf of Channel 5 and Taibbi

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2/ The other named Defendants were the American Broadcasting Company (ABC), Gary LaPierre, Westinghouse Broadcasting Company (Channel 4), the National Broadcasting Corporation (NBC), and Lieutenant William Bergin of the Massachusetts Department of Public Safety. ABC was named a Defendant in two state law claims, one of which has been dismissed; LaPierre and Channel 4 have since been dismissed from the case by stipulation; NBC was not served; the claim against Bergin remains in the federal district court.

along with a Motion to Dismiss filed by ABC, was heard. On April 3, 1981, following a grant of partial summary judgment in favor of Taibbi and Channel 5 limited to the §1983 claims, final judgment was entered on those claims, pursuant to a certificate under Federal Rules of Civil Procedure, Rule 54(b). Jones appealed from those final judgments.[3/] The Judgment of the District Court was affirmed by the Court of Appeals for the First Circuit.

II. Facts

The latter part of 1977 and the early part of 1978 witnessed a bizarre series of Los Angeles murders, commonly referred to as the "Hillside Stranglings." National attention was focused on the resulting investigation conducted by the Los Angeles Police Department (LAPD).

3/ The state claims against Taibbi, Channel 5 and ABC were ordered remanded to the state court. That order was stayed by the District Court pending the outcome of the appeal. The claims against William Bergin remain in the Federal District Court.

Michael Taibbi at this time was an investigative reporter for Channel 5, a television station in Boston, Massachusetts. In late February, 1978, Taibbi was told by a guard at the Massachusetts Correctional Institution at Walpole that an inmate had told the guard that yet another inmate, one George Shamshak, had some connection with, or knowledge about, the Hillside murders. Taibbi learned that Shamshak had spoken with William Bergin, a Massachusetts State Trooper.

The substance of Shamshak's story was that Peter Jones had perpetrated two or three of the murders. Bergin informed Taibbi that two LAPD detectives had come to Massachusetts to interview Shamshak. Taibbi contacted the LAPD Strangler Investigation Squad. Taibbi and the LAPD struck a bargain. The LAPD promised to allow Taibbi to film the arrest of Jones, if made. In return, Taibbi ". . .agreed not to break the story, thereby disrupting

the investigation, before the arrest."

During the next month, Taibbi worked on the story. Well before the arrest of Peter Jones, Taibbi videotaped a number of interviews in preparation for what was called by Channel 5 an "exclusive background report." Among those interviewed were an Officer Donovan of the Massachusetts State Police, and the mother and sister of George Shamshak.

Taibbi also spoke with William F. Hanscom, at the time an officer of the Boston Police Department. Hanscom had been contacted by the LAPD, apparently on the recommendation of George Shamshak. Hanscom told both the LAPD and Michael Taibbi that in Hanscom's experience, Shamshak had been an unreliable unformant. Hanscom's caveat was never broadcast.

Meanwhile, in California, Peter Jones was being watched constantly by the LAPD. In Taibbi's words, ". . . in nearly a month's time, there were only rare

variations in [Jones'] routine. A police source characterized him as a hermit, but also as the kind of man who dropped coins in blindmen's cups and who stopped to help stranded motorists on the highways."

Jones, a 27-year-old without a criminal record had been working at the time at the Beverly Hills Medical Building as an Assistant Maintenance Engineer for approximately a year.

During this period, Shamshak had been transferred from Massachusetts to California, where he apparently underwent more intensive questioning.

The LAPD decided to move on the afternoon of Thursday, March 30th. By making an arrest on a Thursday, the LAPD would not have to prefer formal charges for 72 hours, until the following Monday. The LAPD secured a search warrant for Jones' apartment at 619 Hauser Boulevard in Los Angeles, and for Jones' van. The

affidavit accompanying the application for a search warrant was lengthy. The LAPD did not seek an arrest warrant.

Taibbi and a Mr. Jim Mitchell, a reporter for radio station KFWB, met with one of the commanders of the LAPD Strangler Task Force shortly after noon. After receiving instructions from the police, the reporters followed the officer to the stake-out scene. On the ride to Hauser Boulevard, where the arrest was made, the reporters received a request from the LAPD that they continue to embargo the story for at least a day.

The warrantless arrest took place in a private parking lot near Jones' apartment house. Jones was then driven away, and his apartment sealed. "The entire procedure took 15 minutes and no one seemed to notice what was going on," according to Channel 5's broadcast.

No one noticed, except, of course, Michael Taibbi and Channel 5 newsphotographer

Larry Weisberg, who, as Channel 5 proclaimed, ". . . were the only television news team on the scene when the L.A. Police moved on Jones." The news team videotaped Jones as he arrived in his van and parked, as he was taken out of his van, as he was taken into custody, and as he was placed in the police car. A close-up shot was taken of Jones' face, a photograph not only broadcast, but reprinted in newspapers.

Jones was held on suspicion of murder.

On the 11:00 p.m. broadcast of March 30, Channel 5 announced to its Massachusetts viewers, a "major break in the Hillside case." The anchorperson announced the arrest of Jones, introducing the taped background report which had been previously prepared by Taibbi. That report told the story of Shamshak and his allegations that he'd seen Jones murder two, and perhaps three, young women in the back of a moving van.

Taibbi reported that four polygraph tests[4/] had also supported Shamshak's story, and noted that the Massachusetts police believed that Shamshak's version of the facts "held". The interviews with the Massachusetts state trooper, Donovan, and with Shamshak's mother and sister, were then broadcast. All expressed the belief that Shamshak was telling the truth. Taibbi then posed several "unanswered questions."

> "1. George Shamshak might have been a shocked and arguably innocent witness to one homicide, but could he have seen two or three and not been a participant?
>
> 2. How good a witness is he? For weeks, task force investigators had been telling us that he simply knows too much, much more than he could have learned from news accounts of the killings, but that often, on crucial points, he'd been way off the mark.

4/ There may have been three attempted polygraphs. One indicated deception, one no deception, one could not be completed. All three were primitive attempts.

"3. Are the killings he's talking about in fact the Hillside stranglings? Or were they, as some investigators believe, merely copycat murders?

4. If Peter Jones is the killer, what is it that moved his self-confessed partner in murder to blow the whistle?"

After a return to the interview with Shamshak's mother for some penultimate bathos, Taibbi concluded his background report, "Tomorrow: Peter Jones in California. I am Mike Taibbi." Taibbi, of course, was actually already in California.

The videotape of the actual arrest of Jones was broadcast during the 6:00 p.m. newscast of March 31. The broadcast contained a detailed account of the LAPD's surveillance and arrest of Jones as well as background on two of the murder victims. The report contained an interview with LAPD Chief Daryl Gates by Taibbi in which Gates expressed confidence that

at least some of Shamshak's allegations were true. On that same newscast, the anchorperson asserted Jones had been "charged . . . with two counts of first degree murder."[5/] Before a rebroadcast of the background tape, Taibbi asked yet another question. "But the question for the future: How good is George Shamshak's information on any of the other eleven murders?"

The 6:00 telecast of March 31 continued with a repeat of Taibbi's background report. After a brief exculpatory quote from Jones' former fiancee, the anchorperson told of suspicions of Massachusetts authorities that Jones might have been involved in slayings in Massachusetts. There was then a description of

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5/ Jones was never charged with any crime, but was only being held on "suspicion."

the role of the Massachusetts State Police in the investigation, including a short interview with Lieutenant Bergin.

Subsequent newscasts repeated much of this material. The 11:00 p.m. broadcast of March 31 reported that the suspicions of the Massachusetts authorities had spread to Maineauthorities. The 6:00 p.m. broadcast of April 1 elaborated on those suspicions in a broadcast by one Ron Gollobin of Channel 5.

Beginning on the 6:00 p.m. broadcast on April 1, the newscast acknowledged the LAPD's failure to find sufficient corrobor-ating evidence to warrant bringing formal charges.

The 12:00 noon broadcast on April 3 stated, " . . . by early tomorrow, Los Angeles Police must either charge Peter Mark Jones in connection with some of the Hillside Strangling cases or let him go.

Police say evidence isn't as strong as they'd like it to be but have had no other comment."

Jones was released from custody on Monday, April 3, 1981. A news conference was held by Chief Gates at which Gates stated:

> "I think in fairness to Mr. Jones it would be improper to type him as anything other than a man that we've released, that he's implicated by unsupported statements by Mr. Shamshak. And I don't think it was mentioned before that it may be that in the final analysis irreparable harm will have come to him. Of course, if that is true we are deeply regretful.

The 6:00 p.m. broadcast of April 3 reported Jones' release. Taibbi's coverage was spare. "Los Angeles Police Chief Daryl Gates, told me about an hour ago that the investigation of Jones is not over, though Jones had a solid alibi for one of the nights in question." Channel 5 did not, however, broadcast Gates' statement.

III. Opinion Below

The District Court, citing some of the foregoing facts, held that while there was a coincidence of interest in Jones, the agreement between Taibbi and the LAPD was not such a concert of involvement as to attach §1983 liability to private parties.

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed for two related reasons.

1. The decision below decides a federal question in conflict with the decisions of this Court. Specifically, the agreement and the conduct related to it were permeated with "overt official involvement." Flagg Brothers v. Brooks, 436 U.S. 149, 157 (1978), and fall squarely within the test for attaching §1983 liability to private parties --

". . . willful participat[ion] in joint activity with the state or its agents." Adickes v. Kress, 398 U.S. 144, 152 (1969).

2. Particularly in the context of the preservation of the Seventh Amendment right to have a jury determine contested issues of fact, cf. Adickes, at 176 (Black, J., concurring), it is appropriate to call for an exercise of this Court's power of supervision over the grant of summary judgment. The Discrict Court's analysis (and little less the Court of Appeals summary adoption of that analysis) is a departure from the accepted and usual course of judicial proceeding with respect to decisions on motions for summary judgment.

The party opposing summary judgment has a right to have inferences of controverted facts drawn in his or her favor. Adickes,at 157. The analysis of the District Court stood that right on its head,

particularly in, but not limited to, matters highly relevant to the state of mind, motives, knowledge and conduct of the respondents and the municipal police.

The decision and analysis below arbitrarily deprived the Petitioner of a jury determination of material facts and impermissibly grants a virtual license to news media to combine and conspire with agents of the state, with mutual deliberateness, to profound detriment of a private individual's constitutional, statutory and common law rights.

ARGUMENT

The material fact at issue in this case is whether there was such a "meeting of minds", Adickes, at 158, such concerted action that the respondents could be found by a jury to be "'. . . willful participant[s] in joint activity with the state or its

agency.' United States v. Price, 383, U.S. 787, 794 (1966)" Adickes, at 152.

The unequivocal admission of the express agreement between Taibbi and the LAPD, the execution of that agreement and the fair inferences from materials before the lower court -- even if ignored in that court's analysis -- amply meets the Adickes test.

The conduct of the parties to the agreement was decidedly not one-sided. The LAPD kept Taibbi abreast of the investigation. The LAPD notified Taibbi that the arrest would be made, assuring his presence in California. An LAPD police car led Taibbi to the place where the arrest would be made. Jones was taken into custody at precisely a spot and at precisely a time -- a parking lot to which Jones returned regularly and predictably after work -- where it was convenient and suitable for videotaping. The LAPD

ensured that Taibbi would be able to videotape. The LAPD had a significant and active involvement in carrying out the agreement.

The material before the District Court would permit a jury to conclude that Jones' arrest was, simply put, a staged media event.

The nexus of the agreement between Taibbi and the LAPD was the arrest by police officers of Jones.

A concerted activity is an alliance which appears beneficial, for whatever disparate reasons, to each of the parties involved. It requires only a perceived overlap of the immediate interests, not coterminous motives and powers. Indeed, agreements are made for the very reason that each party believes it can achieve something by acting in concert with another which it could not achieve independently.

A jury could find that Taibbi and Channel 5 needed the State's agreement, used the State, and anticipated profit when the States and Taibbi carried out that agreement. And vice versa.

From Taibbi's side, the object of the agreement was the exclusive film of an arrest in a notorious case, without regard for the validity of the arrest and the damage which would stem from the intense publicity generated from Taibbi's own "scoop". On the LAPD side, the object may well have been a quiet investigation ending with the search of Jones' apartment and van in a last futile effort to corroborate Shamshak's inherently incredible tale, and culminating in an arrest on pure suspicion made in a manner to accommodate Taibbi, but without regard for the validity of the arrest and the damage which would stem from the intense public-

ity generated by permitting the arrest to be staged for Taibbi.

The result of the agreement was nothing other than an arrest staged for the benefit of Taibbi by agents of the State.

Reading Section 1983 " . . . against the background of tort liability," Monroe v. Pape, 365 U.S. 167, 187 (1960), the agreement is more than adequate evidence to meet the classic requirements in tort for concerted activity. 6/

6/ PERSONS ACTING IN CONCERT

For harm resulting to a third person from the tortious conduct of another, one is subject for reliability if he

(a) does a tortious act in concert with other or pursuant to a common design with him, or (b) knows of the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so as to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person/

Restatement of Torts, Second (American Law Institute, 1979 ed.), section 876.

The concerted activity, capped by the dramatic arrest of Jones, was permeated with "overt official involvement." Flagg Brothers v. Brooks, 436 U.S. 149, 157 (1970).

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) cited by the District Court, represents a completely different fact situation in which state involvement was limited to the issuance of licenses, a passive function. An arrest is quintessentially a state function, a significant involvement.

Taibbi, a newsperson without privileged status under §1983, see Houtchins v. KQED, Inc. et al., 431 U.S. 1 (1979), bargained for the overt official involvement.

As a result of the agreement and the involvement, Jones was dragged into the public light unfairly and unwil-

lingly, cf. Walston v. Readers Digest, 443 U.S. 157 (1979). The concerted actions of the LAPD and Taibbi caused Jones to be exposed to the extraordinary public obloquy of an erroneous arrest broadcast instantly into tens of thousands of houses in his home state of Massachusetts. A private individual, subjected to such deliberate team play, is helpless and without effective channels to rebut misleading and defamatory public exposure. Gertz v. Robert Welch, 418 U.S. 323 (1974).

Taibbi and Channel 5 got that for which they bargained. A jury should be permitted to weigh their liability under §1983.

The analysis below never acknowledges that the media defendants did not contest that Jones' warrantless arrest on suspicion was unreasonable. See

Dunaway v. New York, 442 U.S. 200 (1979). The clear unreasonableness of the arrest is relevant to the inferences which may be drawn regarding the mutual involvement of the LAPD and Taibbi in the filming and the broadcast.

Taibbi could be found to have actual knowledge of the unreasonableness of the arrest. He did have knowledge that the LAPD had doubts surrounding the informant's credibility. Indeed, Taibbi admitted on the air that, "for weeks, task force investigators have been telling us that [Shamshak] knows too much . . . but that often, on crucial points, he's been way off the mark."

While Taibbi and his radio colleague were on the way to the stakeout, they were asked to withhold publication of the events they were about to witness. The clear inference, from the immediate

publication, is that Taibbi was not about to be influenced by the investigators' own doubts. Both the basic fact and the inference were ignored by the District Court.

Taibbi's knowledge of the doubtful credibility of Shamshak's story was not limited to information gleaned from his self-proclaimed intimacy with the LAPD. It is uncontested by Taibbi and, once again, unremarked by the District Court, that Taibbi had been told by the very Boston police officer who had been named by Shamshak to vouchsafe his credibility, that Shamshak was an unreliable informant.

Although Taibbi knew for weeks that Shamshak's story had serious problems with it, and that Shamshak himself was unreliable, he occupied himself filming background interviews with Shamshak's relatives and interested police. He neglected

to investigate yet a third area which would have rapidly raised questions about Shamshak's story. It was again unremarked by the District Court below that other reporters, less wed to an exclusive "scoop", within hours of Jones' arrest were able to research and then publish facts on Jones' background and reputation which made Shamshak's story highly implausible.

The District Court below paraphrased and distorted Taibbi's own statement describing the agreement with the LAPD. According to the District Court, "Taibbi agreed not to publicize what he knew about Jones' alleged involvement, so as not to disrupt the investigation. In return, the LAPD promised to allow Taibbi to film the arrest of Jones, if made." Opinion, at Appendix, p. 8f. Taibbi's affadavit is quite different. "In return for their

permission to film Jones' arrest, if made, I agreed not to break the story thereby disrupting the investigation before the arrest."

The District Court's paraphrase enables it to draw a further highly speculative inference in favor of Taibbi, characterizing Taibbi's delay in publication as "selfless." Opinion at App. p. 22.

Taibbi's actual statement is open to a more ominous inference. Where the LAPD was plagued by media attention, making it, in the words of the LAPD Police Chief, ". . . almost impossible to conduct a sound, sane, investigation." a jury might well reach the conclusion that Taibbi had the LAPD over a barrel, knew it and capitalized on it.

The materials before the lower court met also the somewhat different and pointed test suggested in Lugar v.

Edmondson Oil Co., 639 F. 2d 1058 (4th Cir. 1981), review granted ____ U.S. ____, 49 U.S.L.W. 3923 (June 16, 1981).

In addition to the public's "right to effective law enforcement" and the public's "right to know", the general notions invoked by the District Court, Opinion, App. p. 23 , an individual citizen has certain specific and well articulated basic constitutional rights. 42 U.S.C. §1983 enforces the duty of State officials to respect and safeguard these basic rights. To the extent that the agreement between Taibbi and the LAPD influenced the LAPD in the fact and manner of the arrest, and therefore the foreseeable consequences of an arrest both wrong and wrongful, to that extent the LAPD fell short of its duty. There was such a ". . . corruption of official power by the [private party] [and a] surrender of

power by the [State official] that the independence of the enforcing official has been compromised to a significant degree." Lugar, at 1069.

The Lugar test properly focuses on assigning responsibility for unconstitutional uses of State power. Staged media events have no legitimate role in effective law enforcement. Nor does a public "right to know" automatically legitimize a staged event which owes its very existence to television's pandering to the public's taste for scandal.

Concerted activity and deliberate agreements such as found here, between the State, with its monopoly on the use of force, and a television station, with its instant and personal contact with millions of viewers, can generate a pernicious synergy, a momentum foreseeably leading each of them to a callous dis-

regard of the elementary and basic right of a private citizen to be secure in his person and reputation.

Taibbi and Channel 5, and the LAPD were indeed in an unholy alliance.

CONCLUSION

The analysis in the courts below usurped the proper role of the jury when granting summary judgment, and misconceived the substantive law of concerted activity under 42 U.S.C. §1983.

For the foregoing reasons, the Petition for a Writ of Certiorari to the Court of Appeals for the First Circuit should be granted.

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FEDERAL RULES OF CIVIL PROCEDURE, RULE 56

Summary Judgment

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any party thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a

trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that apepar without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such

facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjusted guilty of contempt.

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

PETER MARK JONES, Plaintiff	*	
v.	*	CA 79-821-T
MICHAEL TAIBBI, ET AL., Defendants	*	

OPINION

TAURO, D.J. March 5, 1981

This case arises out of a series of news telecasts on WCVB-TV (Channel 5) in Boston implicating plaintiff (Jones) in certain murders that took place in Los Angeles roughly three years ago. Citing these broadcasts, plaintiff seeks to recover for defamation, invasion of privacy, and infringement of his civil rights under 42 U.S.C. Section 1983. At issue here are the motions of defendants

Channel 5, and its newscaster Michael Taibbi, for summary judgment, and the American Broadcasting Company's (ABC) Motion to Dismiss.[1/]

I.

The latter part of 1977 and early part of 1978 witnessed a bizarre series of Los Angeles murders, commonly referred to as the "Hillside Stranglings." National attention was focused on the resulting investigation conducted by the Los Angeles Police Department (LAPD).

During this period, defendant Taibbi served as investigative reporter for defendant Channel 5. In late February of 1978, Taibbi learned from a prison

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1/ Plaintiff brings the privacy claim against all three defendants, and the defamation and civil rights claims against Taibbi and Channel 5 only.

guard that an MCI-Walpole inmate named George Shamshak had some connection with, or knowledge about, the Hillside murders. The substance of Shamshak's story was that plaintiff Jones had perpetrated two or three of the murders. At about the same time, William Bergin,[2/] a Massachusetts state trooper, learned of Shamshak's allegations and communicated them to the LAPD. Bergin then informed Taibbi that two LAPD detectives had come to Massachusetts to interview Shamshak. That, in turn, prompted Taibbi to contact the LAPD's Strangler Investigation Squad. Taibbi and the LAPD struck a bargain. Taibbi agreed not to publicize what he knew about Jones' alleged involvement,

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2/ Bergin, also a defendant in the case, is not one of the movants here.

so as not to disrupt the investigation. In return, the LAPD promised to allow Taibbi to film the arrest of Jones, if made.

The scene then shifted to California. The LAPD placed Jones, a janitor in a Los Angeles medical building, under constant surveillance. In addition, Shamshak was transferred from Massachusetts to California for more intensive questioning. On March 30, after nearly a month of surveillance, the police arrested Jones and conducted a search of his apartment and van. Taibbi, pursuant to his agreement with the LAPD, was on hand with a camera crew to film the arrest. After the arrest, police held Jones on suspicion of involvement in the Hillside murders.

On the 11:00 p.m. newscast of March 30, Channel 5 announced a "major

break" in the Hillside case. The anchor-person described the arrest of Jones, and introduced a taped background report prepared by Taibbi. That report told the story of Shamshak and his allegations that he had seen Jones murder at least two, and perhaps three, young women in the back of a moving van. Taibbi reported that four polygraph tests had supported Shamshak's story, and noted that the Massachusetts police believed that Shamshak's version of the facts "held". The video then cut to interviews Taibbi conducted with a Massachusetts police-man and with Shamshak's mother and sister. All expressed the belief that Shamshak was telling the truth. The telecast then concluded with Taibbi posing several "unanswered questions", some of which

cast doubt on shamshak's credibility.[3/]

Over the next few days, Channel 5 telecast follow-up reports on the investigation, some of which contained portions of the film taken by Taibbi's crew at the time of arrest. The 6:00 p.m. newscast on March 31 featured a detailed account of the LAPD's surveillance and arrest of Jones, as well as background on two of

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3/ Taibbi observed:

> 1. George Shamshak might have been a shocked and arguably innocent witness to one homicide, but could he have seen two or three and not have been a participant?
>
> 2. How good a witness is he? For weeks, Task Force investigators have been telling us that he simply knows too much, much more than he could have learned from news accounts of the killings, but that often, on crucial points, he's been way off the mark.
>
> Defendants' Exhibit A, at 4-5.

the murder victims. The report also contained an interview of LAPD Chief Daryl Gates by Taibbi, in which Gates expressed confidence that at least some of Shamshak's allegations were true. On that same newscast, the anchorperson asserted that plaintiff had been "charged...with two counts of first degree murder." Defendants' Exhibit A, at 9. The March 31 telecast continued with a repeat of Taibbi's March 30 background report. It concluded with exculpatory quotes from Jones' former fiancee, and then a brief description of the Massachusetts State Police's role in the investigation.

Central to the complaint here is the fact that the anchorperson erred in his assertion that Jones had been charged with two counts of first degree murder. In fact, he had not been charged with

any crime, but was only being held on suspicion.

Subsequent newscasts repeated much of this material, and described the suspicions of Massachusetts and Maine police that Jones might have been involved in slayings in those two states. Beginning on April 1 at 6:00 p.m., the newscasts acknowledged the LAPD's failure to find sufficient corroborating evidence to warrant bringing formal charges. On April 3 at 6:00 p.m., the anchorperson reported that Jones had been released for lack of evidence. Taibbi then explained that, although the investigation was not closed, the LAPD found that Jones "had a solid alibi for one of the nights in question." Defendants' Exhibit A, at 24. Several more newscasts repeated that Jones had been set free for lack of evidence.

Approximately one year later, plaintiff brought this action in Norfolk Superior Court. The complaint claims $3.45 million in damages for violations of plaintiff's civil rights and right to privacy, and for defamation and false imprisonment.[4/] Defendants removed the action to this court.

II.

A. The Section 1983 Claim

Federal jurisdiction in this case hinges on plaintiff's 42 U.S.C. Section 1983 claim against Taibbi and Channel 5. Jones argues that Taibbi and Channel 5 acted as co-conspirators and/or agents of the LAPD in defaming him[5/] and violating

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4/ The false imprisonment claim does not implicate the moving defendants.

5/ Count IV of the complaint asserts that defendants broadcast plaintiff's arrest and search "after acting in concert with and as agents of the Los Angeles Police Department, and did thereby defame Jones." Plaintiff originally named ABC as a defendant in this count, but later agreed to a dismissal.

his privacy when they broadcast the film of his arrest.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or innumities secured by the Constitution and laws, shall be liable to the party injured in an action at law... .

42 U.S.C. Section 1983.

There are two necessary elements of any section 1983 claim:

> First, the plaintiff must prove that the defendant has deprived him of a right secured by the 'Constitution and laws' of the United States. Second, the plaintiff must show that the defendant deprived him of this constitutional right 'under color of law.'

Adickes v. Kress, 398 U.S. 144, 150 (1970). Plaintiff's section 1983 claim lacks the second of these elements, as the defendants did not act under color of state law.

In exceptional circumstances, private parties may be deemed to have acted under color of state law.[6/] But there are no exceptional circumstances here that would warrant a finding of state action. The only concerted action between the defendants and the state was Taibbi's agreement not to disclose what he knew about Jones until, if ever, Jones was arrested by the LAPD. In return, Taibbi

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6/ Attempts to charge the media with state action have generally met with a cool reception in the courts. See, e.g., Belluso v. Turner Communications Corp., 49 U.S.L.W. 2434 (5th Cir. Dec. 22, 1980); Chicago Joint Bd., Amal. Wkrs. v. Chicago Tribune Co., 435 F.2d 470, 473-78 (7th Cir. 1980), cert. denied, 402 U.S. 973 (1971); Sheppard v. E.W. Scripps Co., 421 F.2d 555, 556 (6th Cir.), cert. denied sub. nom. Strickland, Executrix v. E.W. Scripps Co., 400 U.S. 941 (1970); Keen v. Philadelphia Daily News, 325 F.Supp. 929, 930 (E.D.Pa. 1971); Cook v. Advertiser Co., 323 F.Supp. 1212, 1214 (M.D. Ala.), aff'd, 458 F.2d 1119 (5th Cir. 1972).

would be permitted to film the arrest. Taibbi was not an informer. Indeed, the LAPD already knew what he knew. In what was at least arguably an exercise of responsible restraint, Taibbi agreed to defer telecasting what was known to both him and the authorities until the LAPD felt it was warranted in seeking an arrest. On these facts, there was no delegation of an essential public function by the state to a private party, see, Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974), nor do the facts demonstrate any "symbiotic relationship" bewteen the state and the defendants that would bring the broadcasters' acts within the scope of section 1983. See, Burton v. Wilmington Parking

Authority, 365 U.S. 715 (1961).[7]

Plaintiff's most persuasive argument relies on a line of cases attaching section 1983 liability to private parties who are "willful participant(s) in joint activity with the State or its agents." See, Adickes v. Kress & Co., 398 U.S. 144, 152 (1970); United States v. Price, 398 U.S. 787, 794 (1966).[8] The theory is

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7/ Even a "considerable degree of cooperation" between a private and the state does not, standing alone, justify a finding that the challenged action, in this case a telecast, occurred under color of state law. See, Rendell-Baker v. Kohn, No. 80-1328, Slip Op. at 17 (1st Cir. Feb. 12, 1981).

8/ In Adickes, a white school teacher brought a section 1983 action against a Hattiesburg, Missippi restaurant, alleging that defendant had conspired with the local police to refuse her service because she was a "Caucasian in the company of Negroes." 398 U.S. at 147. The Court denied defendant's motion for summary judgment, finding triable facts bearing on whether defendant and the

(footnote continued)

that the agreement between Taibbi and the LAPD amounted to an "unholy alliance."[9] The facts, however, demand a contrary conclusion. Taibbi merely agreed not to disclose Jones' alleged involvement prematurely. At most, his motive was to get a better story later -- the arrest. His inaction does not transmute to state action merely

(footnote continued)

8/ police "had a 'meeting of the minds' and thus reached an understanding that (plaintiff) should be refused service." Id. at 158.

Price involved a dismissal of an indictment under 18 U.S.C. Section 242, the criminal analogue of Section 1983. The indictment alleged thatthe Deputy Sheriff of Neshoba County, Mississippi, had arranged with seventeen other official defendants to release three men from county jail and then capture and kill them. The Court refused to dismiss the indictment as agaisnt the non-official defendants. Justice Fortas found that the indictment charged a "brutal joint venture" of which "(s)tate officers had participated in every phase." 383 U.S. at 795.

9/ Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment, at 17.

because it permitted the LAPD to continue its surveillance, unbeknownst to Jones and the public. Nor does the fact that Taibbi's restraint earned him a front line vantage point at the arrest make him an agent of the state. The LAPD did not play any role in determining what Taibbi would film or later telecast. Taibbi had no part in the determination as to whether or when Jones would be arrested. Although both LAPD and Taibbi had an interest in Jones, their respective motives were disparate. Taibbi and the LAPD had a coincidence of interest in the plaintiff as a suspect, but not the concert of involvement that would transform Taibbi's telecast from a private venture to action under color of state law.[10/]

10/ Cf. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (where impetus

(footnote continued)

10 (footnote continued)

for racial discrimination is private, state action occurs only when state has "significantly involved itself with invidious discrimination").

Courts has generally equated Fourteenth Amendment "state action" with action "under color of state law." See, e.g., Briley v. California, 564 F.2d 849, 855 (9th Cir. 1977); Greco v. Orange Memorial Hospital, 513 F.2d 783, 877, n. 7 (5th Cir. 1975); Perez v. Sugarman, 499 F.2d 761, 764 (2d Cir. 1974).

The fourth Circuit recently adopted a somewhat different anlaysis in Lugar v. Edmondson Oil Co., Inc., 49 U.S.L.W. 2450 (Jan. 9, 1981). In that case, plaintiff brought a section 1983 suit against a creditor whose ex parte invocation of state prejudgment attachment procedures resulted in a levy upon plaintiff's property. The Court found that although the acts of the state court clerk and county sheriff amounted to state action, they did not suffice to charge the creditor with acting under color of state law. A private party acted under color of state law, the court reasoned, only when it usurped or was given so much official power that the independence of the official was compromised to a significant degree.

Even under this approach, Jones' section 1983 claim would be insufficient. Taibbi had no control over whether or when plaintiff would be arrested. Similarly, the LAPD was not involved in Taibbi's decision to cover the story, or the decision of Channel 5 to telecast Taibbi's coverage either in whole or in part.

Plaintiff's theory would, in effect, "deputize" news persons like Taibbi merely because his decision to postpone publication was of some ancillary benefit and assistance to the police. The typical "at large" reporter routinely learns details pertaining to ongoing police investigations. The decision as to whether or when to publish that information is often difficult and sensitive. On the one hand is the concern that a competitor will scoop you. On the other, is the selfless recognition that premature publication could alert the targets of the investigation, thereby aborting a painstaking police effort and perhaps endangering the safety of law enforcement personnel.

Defendant Taibbi, confronted with this dilemma, pursued a sensible course -- he contacted the police, determined the infor-

mation was sensitive, and agreed to delay publication. The decision to delay was Taibbi's alone and not that of the police. It was made after he balanced his First Amendment responsibilities as a reporter with his at least equally compelling responsibilities as a citizen. To reward Taibbi's exercise of discretion by subjecting him to liability under federal civil rights laws would establish a precedent inconsistent with the public interest, which includes both a right to know, and a right to effective law enforcement.[11/]

11/ See, Belluso v. Turner Communication Corp., 49 U.S.L.W. 2434 (5th Cir. Dec. 22, 1980) (holding that government regulation of broadcasting does not transform private broadcasters into governmental entities and noting that broadcasters enjoy wide discretion over the content and format of their programming).

The motions of Taibbi and Channel 5 for summary judgment are allowed with respect to plaintiff's claim under 42 U.S.C. Section 1983. An order will issue.

B. The State Law Claims.

The insufficiency of plaintiff's section 1983 claim raises doubts about whether this court should exercise pendent jurisdiction over the defamation and invasion of privacy claims against Taibbi and Channel 5, as well as the privacy claim against ABC, all of which involve solely state law questions. Pendent jurisdiction is a "doctrine of discretion." United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). But Gibbs also admonishes that,

> if the federal claims are dismissed before trial even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well.

Id.

That is precisely the circumstance here. The federal claim has been dismissed. This court has undertaken no substantial analysis of the pendent claims, so their dismissal will not have wasted judicial energy or resources. Moreover, adjudication of the state claims urged by plaintiff would send this court on an expedition into largely uncharted areas of state law.[12/] Federalism is best served by permitting the Massachusetts courts to formulate the basic legal principles and balance the state policies surrounding these state causes of action.

The defamation and invasion of privacy claims against all three defendants are, therefore, remanded to the Massachusetts Superior Court. An order will issue.

/s/ Joseph L. Tauro
United States District Judge

12/ (footnote on next page)

12/ (footnote from preceding page)

This is especially true with regard to the privacy claim. The relatively few decisions handed down by Massachusetts courts so far have resisted establishing broad legal principles, focusing instead on the particular facts at hand. See, Hastings & Sons Publishing Co. v. City Treasurer, 375 N.E.2d 299, 304 (Mass. 1978) ("Without delineating the precise scope of the right or privacy afforded by G.L. c. 214, section 1B, we can state with confidence that disclosure of these payroll records would not constitute an unreasonable, substantial or serious interference with (that right)"); Broderick v. Police Commissioner of Boston, 330 N.E.2d 199, 206 (Mass. 1975) (policemen accused of disruptive conduct during Law Day celebration could be required to answer written questions about the alleged incidents, inasmuch as they had "surrendered (their right or privacy) by public display."), cert. denied, 423 U.S. 1048 (1976); Cefalu v. Globe Newspaper Co., 391 N.E.2d 935, 939 (Mass. App. 1979) ("Whatever conduct may rise to a violation of this statute, the publication of the photograph of a line of people in a government building is not it... . The appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects."), appeal dismissed, 444 U.S. 1060 (1979); Commonwealth v. McDuffee, 386 N.E.2d 754, 758 (Mass.App. 1979) (required disclosure of pending indictment on application for renewal of insurance broker's license did not constitute unreasonable, substantial, or serious intereference with privacy),

rev'd on other grounds, 398 N.E.2d 463 (1979).

The basic principles applicable to the defamation cause of action are much better established. See, Stone v. Essex County Newspaper, Inc., 330 N.E.2d 161 (Mass. 1975). But the core of plaintiff's defamation claim is his contention that defendants "endorsed" Shamshak's sotry and are therefore responsible for its content. There seems to be no Massachusetts precedent relevant to this theory of endorsement.

A factor unique to the radio and television media, Federa. Communications Commission (FCC) regulatory requirements may be considered relevant by the Massachusetts courts in determining the reasonableness of defendants' care under the circumstances of this case. Unlike the print media, defendant Channel 5 needs a license to communicate to the public, and that license is granted only if the FCC finds that "public interest, convenience, and necessity would be served thereby." See, 47 U.S.C. Sections 307(a) and (c). In turn, the breadth and quality of news programming as well as the broadcaster's responsiveness to the needs of the community constitute relevant factors in determining whether the public interest is served. See, Alianza Federal de Mercedes v. FCC, 539 F.2d 732, 739 (D.C. Cir. 1976); Robinson v. FCC, 334 F.2d 534, 536 (D.C. Cir. 1964). The public has come to expect instant and on the spot coverage of major news events. The demands of such public service coverage require at least a reassessment of traditional notions of libel law and their applicability to "on the

spot, live, instant news coverage." It is one thing to equire a newspaper to check the accuracy of an interview. But it may be another matter to hold a TV newsperson responsible for the spontaneous live utterance of an interview. Although this case involves the statements of a TV reporter, not an interviewee, concern as to the general standard to be applied nonetheless permeates the case.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 81-1234

PETER MARK JONES,
Plaintiff, Appellant

v.

MICHAEL TAIBBI, THE BOSTON BROADCASTERS, INC., ET AL.,
Defendants, Appellees.

Before
CAMPBELL, BOWNES AND BREYER,
Circuit Judges.

MEMORANDUM AND ORDER

Entered June 17, 1981

Having examined appellant's brief and the record, we are in agreement with the analysis employed by the district court and therefore affirm on the basis of its opinion of March 5, 1981

Affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk

(cc: Messrs. Gideonse, Williams and Dushman)

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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PETER MARK JONES,
Plaintiff, Appellant,

v.

MICHAEL TAIBBI, THE BOSTON BROADCASTERS, INC., ET AL.,
Defendants, Appellees.

Before CAMPBELL, BOWNES and BREYER,
Circuit Judges.

ORDER OF COURT

Entered July 8, 1981

Upon consideration of appellant's petition for rehearing,

It is ordered that the petition for rehearing be denied.

By the Court:

DANA H. GALLUP, Clerk.

By_____
Chief Deputy Clerk

(cc: Messrs. Gideonse, Williams and Dushman)

Opposition

Office - Supreme Court, U.S.
FILED
NOV 4 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-670.

In the Supreme Court of the United States.

OCTOBER TERM, 1981.

PETER MARK JONES,
PETITIONER,

v.

MICHAEL TAIBBI,
AND
BOSTON BROADCASTERS, INC.,
D/B/A CHANNEL 5,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondents' Brief in Opposition.

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No. 81-670.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Respondents' Brief in Opposition.

Statement in Support of Respondents' Brief in Opposition.

Respondents rest their opposition to the grant of certiorari on the statement of facts and conclusions of law contained in the opinion of the United States District Court below. *Jones* v. *Taibbi*, 508 F.Supp. 1069 (D. Mass. 1981) (Petr.'s App. 6). The District Court granted summary judgment against Petitioner on his 42 U.S.C. § 1983 claim after concluding that

Respondents, a television news station and its reporter, did not act under color of state law in filming and broadcasting Petitioner's arrest.

The United States Court of Appeals for the First Circuit found itself "in agreement with the analysis employed by the district court" and summarily affirmed without requesting oral argument or briefing by Respondent (Petr.'s App. 29). Petitioner's subsequent motion for rehearing was similarly denied (Petr.'s App. 30).

The decision of the District Court as adopted by the First Circuit Court of Appeals does not conflict with that of another federal court, does not call for an exercise of the Supreme Court's supervisory powers, and does not present an important question of federal law that should be settled by this Court. *See* Sup. Ct. R. 17.1. Petitioner has not demonstrated any basis for the Supreme Court to exercise its discretion to review this case. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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